No. 13890

IN THE

United States Court of Appeals

For the Ninth Circuit

CONSOLIDATED FREIGHTWAYS, INC., a corporation,

Appellant,

vs.

UNITED TRUCK LINES, INC., a corporation,

Appellee.

Appeal from the District Court of the United States for the District of Oregon

HON. GUS J. SOLOMON, *Judge*

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

The only question on this appeal is whether or not the District Court had jurisdiction of this action.

Appellant's Complaint affirmatively showed that there was no diversity of citizenship between the parties, but jurisdiction of the Court was sought to be invoked under 28 U.S.C.A. Sec. 1337, which provides that

> "The District Court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce

or protecting trade and commerce against restraints and monopolies." (Tr. 3-6.)

The substance of the Complaint otherwise was that appellant held a certificate from the Interstate Commerce Commission to transport cargo over U. S. Highway No. 30; that appellee did not hold such a certificate over U. S. Highway No. 30; that appellee, notwithstanding, had been transporting cargo over that highway and had diverted traffic and revenues from appellant, and the Complaint sought money damages therefor.

Appellee, by a Motion to Dismiss, challenged the jurisdiction of the Federal courts on the ground that this was a simple tort action, and that the action did not "arise" under any Act of Congress. The District Court granted appellee's Motion and dismissed the action for want of jurisdiction (Tr. 19).

ARGUMENT

1. Argument in support of judgment.

It has been uniformly held throughout the years by the United States Supreme Court that an action is not one "arising" under the Constitution or Laws of the United States, so as to give Federal courts jurisdiction in non-diversity cases, unless the action involves a real controversy between plaintiff and defendant concerning the validity, construction or effect of some Federal law or constitutional provision.

In *Gully vs. First National Bank,* 299 U. S. 109, 81 L. ed. 70, speaking through Justice Cardozo, the Court said:

"How and when a case arises 'under the Constitution or Laws of the United States' has been much considered in the books. Some tests are well-established. To bring a case within the statute, a right or immunity created by the Constitution or Laws of the United States must be an element, and an essential one, of the plaintiff's cause of action (citing cases). The right or immunity must be such that it will be supported if the Constitution or Laws of the United States are given one construction or effect, and defeated if they receive another (citing cases). A genuine and honest controversy, not merely a possible or conjectural one, must exist with reference thereto (citing cases), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."

In *Shulthis vs. McDougal,* 225 U. S. 561, 56 L. ed. 1205, the Court said:

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

Other cases so holding are:

Norton vs. Whiteside, 239 U. S. 144; 60 L. ed. 186;

Western Union vs. Ann Arbor Railway, 178 U. S. 239, 44 L. ed. 1052;

South Covington Railway Co. vs. Newport, 259 U. S. 97, 66 L. ed. 842;

Bell vs. Hood, 327 U. S. 678, 90 L. ed. 939.

The last cited case of *Bell vs. Hood,* which is so heavily relied upon in appellant's brief, clearly reiterated this fundamental test, where the Court said:

> "Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and Laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction."

Another clearly established principle is that the existence of such a controversy between plaintiff and defendant concerning the validity, construction or effect of a Federal law must appear affirmatively from the complaint alone, by distinct factual pleadings therein.

Gully vs. First National Bank, 299 U. S. 109, 81 L. ed. 70;

Norton vs. Whiteside, 239 U. S. 144, 60 L. ed. 186;

South Covington Railway Co. vs. Newport, 259 U. S. 97, 66 L. ed. 842;

Western Union vs. Ann Arbor Railway, 178 U. S. 239, 44 L. ed. 1052.

Tested by the foregoing principles, it seems apparent that appellant's Complaint fails to state any basis for Federal jurisdiction. There is no allegation in the Complaint that the appellee claimed any right from the Interstate Commerce Commission to traverse U. S. Highway No. 30 which might make it necessary for the Court to interpret the Motor Carrier Act. For all that appears, appellee was a complete interloper, and it would seem from the Complaint that the only issue to be determined by

the Court was the amount of damages occasioned to appellant by appellee's use of the highway.

There is no allegation in the Complaint that appellant claims a right of action by virtue of any Act of Congress; on the contrary, a memorandum of authorities filed by appellant in the District Court (Tr. 7) stated:

> "The substantive law of this case is bottomed upon the proposition contained in Section 710 of the Restatement of Torts (American Law Institute, Volume III, 1938):
>
> > 'Section 710. Engaging in business in violation of legislative enactment.
> >
> > 'One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,
> >
> > > (a) one of the purposes of the enactment is to protect the other against unauthorized competition and
> > >
> > > (b) the enactment does not negative such liability.' " (Tr. 7).

This suit then is simply one for damages for an ordinary tort, clearly involving no controversy as to the validity, construction or effect of the Federal laws regulating commerce or any other Federal law, and we submit that the District Court was correct in dismissing the action for want of Federal jurisdiction.

2. **Argument in answer to appellant.**

a. APPELLANT'S POINT I (Appellant's Brief, pp. 4 to 9).

Here appellant asserts in effect that the violation of any provision of any Federal enactment can be made the basis of Federal jurisdiction of an action for money damage for such violation.

Appellant, in support of this unusual and novel claim, relies upon the case of *Fratt vs. Robinson,* 203 Fed. (2d) 627, a recent decision of this Court. That was a suit for money damages resulting from a violation of Section 10 (b) of the Securities Exchange Act of 1934 (15 U.S.C.A. Sec. 78j (b)). This Court held in the *Fratt* case that a suit for money damages would lie for a violation of that section of the Securities Exchange Act, even though the section did not in terms provide for money damages, because the Act contemplated such a right of action. That being so, the Federal courts would clearly have exclusive jurisdiction of such a suit by virtue of Section 27 of the Securities Exchange Act of 1934 (15 U.S.C.A. 78aa), which provides:

> "The District Courts of the United States * * * shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

Moreover in the *Fratt* case there was a question for the Court as to the construction or effect of the Securities Exchange Act since it was necessary for

the Court to determine as an issue of law that the Securities Exchange Act, although not specifically providing therefor, contemplated a right of action for damages to one injured through a violation of Section 10 (b) of the Act. Upon the latter basis, this Court, citing and relying upon the case of *Bell vs. Hood,* 327 U. S. 678, 90 L. ed. 939, found that the District Court had jurisdiction.

In the case of *Bell vs. Hood,* 327 U. S. 678, 90 L. ed. 939, the Supreme Court determined that there was Federal jurisdiction because the plaintiffs in that case elected to claim a right of action directly flowing from a violation of rights and immunities guaranteed to them under the 4th and 5th Amendments of the United States Constitution, rather than claiming simply an ordinary trespass. Because of this unique theory advanced by the plaintiffs in the *Bell* case, the Supreme Court found Federal jurisdiction to exist, saying:

> "Whether the petitioners are entitled to recover depends upon an interpretation of 28 U.S.C. Section 41 (1) and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their Complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason, the District Court has jurisdiction."

In other words, in the *Bell* case a novel claim was asserted in the complaint that the plaintiffs had a cause of action directly flowing from a violation of

rights and immunities guaranteed to them under the 4th and 5th Amendments of the United States Constitution. The Supreme Court determined that there was Federal jurisdiction in that case by reason of the novelty of the claim and the fact that it would be necessary for the Court to determine whether a right to damages existed strictly based upon the violation by Federal employees of these constitutional guarantees.

Likewise in the case of *Fratt vs. Robinson,* 203 Fed. (2d) 627, no common law right of action was asserted, but rather an action purely arising out of a violation of a section of the Securities Exchange Act, an action which, although not specifically provided for, was by this Court read into the Act as a necessary counterpart to the expressed purposes of that particular Federal legislation.

Here appellant itself concedes that it is asserting a purely common law action for an alleged tort committed by appellee. How can it possibly be said here that any question of the interpretation or effect of any Federal law would be at issue? It is settled that the Federal jurisdiction must appear from the face of the complaint and nowhere in the complaint is any reliance placed upon any statutory right of action or any controversy asserted as to the interpretation or effect of any Federal law; rather it definitely appears that no Federal question could possibly be involved. We submit that appellant's Point I is without merit.

b. Appellant's Point II (Appellant's Brief, pp. 9 to 19).

If we understand appellant's argument at this point, it is that an area of Federal jurisdiction was created by that part of Section 22 of Title 49 of United States Code, which reads as follows:

> "* * * and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Just how appellant arrives at this conclusion is not at all clear to us.

The Railway Act (Title 49 U. S. Code, Part I) gave a rail carrier the right to sue for damages in Federal Court against one engaging in competition in violation of the Act (49 U.S.C.A. Sec. 8 and 9). The Motor Carrier Act (Title 49 U. S. Code, Part II) contains no such grant of Federal jurisdiction. This difference between the two Acts should be borne in mind in analyzing the railway cases cited by appellant.

Appellant cites and relies upon *Pennsylvania Railroad vs. Sonman Coal Co.,* 242 U. S. 120, 61 L. ed. 188, and *Pennsylvania Railroad Co. vs. Puritan Coal Co.,* 237 U. S. 121, 59 L. ed. 867, as authority for its contention, but all those cases decided was that the above quoted Section 22 did not abridge any rights of action which had existed to an aggrieved party prior to the passage of the Act, and that suits could be maintained in State courts in railway cases, where

a common law remedy existed, notwithstanding that the Railway Act also permitted the same suit in a Federal court.

What appellant is doing here is taking a few words out of context as authority for its contention, where it is obvious from the entire decision that the Supreme Court was not defining any new area of Federal jurisdiction. For instance, from the *Sonman Coal Company* case, appellant italicizes that the claim "may be prosecuted in either a Federal or a State court," and "may be enforced in either a Federal or a State court." However, by reading the entire surrounding text, it is perfectly obvious that the point at issue, and which the Supreme Court was deciding, was whether or not, before maintaining the suit in question, resort had to be had to the administrative procedures of the Interstate Commerce Commission, and the Court was deciding that such was not necessary under the facts of those cases. The Supreme Court doubtless, in using the quoted language, had in mind that such a suit might be prosecuted in Federal Court if one of the usual jurisdictional situations existed; diversity of citizenship or a controversy concerning the validity, construction or effect of Federal law.

In both the *Sonman Coal Company* case and the *Puritan Coal Company* case, the actions had been brought in a State court, and there was most certainly no question before the Court of the extent of Federal jurisdiction, and the Court could not possibly have intended to delineate an area of Federal jurisdiction in those cases.

In addition to the foregoing Supreme Court cases, appellant cites *Powers vs. Cady,* 9 Fed. (2d) 458, a District Court case, claiming that it holds squarely that Section 22 of Title 49 created an area of Federal jurisdiction. But no such thing is decided in that case, and an examination will reveal that the only question before the Court was whether in that case, resort should have been made by the plaintiff to the administrative procedures of the Interstate Commerce Commission before commencing suit, and the Court only held that such was not necessary in that case.

Certainly Section 22 of Title 49 preserves common law rights; certainly appellant has a common law right to damages if, as alleged, appellee was trespassing on U. S. Highway No. 30; and certainly it has a right to bring such an action in the proper State court. However, it is beyond our comprehension how it can be seriously contended that Section 22 of Title 49, where it says "and nothing in this Chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies," can of itself create a field of Federal jurisdiction, and we are unable to see where appellant finds any support for its contention in the cases cited by it.

Nowhere in the Motor Carrier Act is any special right of action created in favor of one motor carrier as against another who trespasses on its routes, and any remedy which such an aggrieved carrier might

have must be a common law right. Appellant recognized that in its memorandum of authorities to the District Court (Tr. 7). Appellant could only have a right to sue in Federal Court if by its Complaint it appeared that the case was one "arising" under any Act of Congress regulating commerce, and as we have heretofore shown, the term "arising" has always been held to require that there be a real controversy apparent from the face of the Complaint as to the validity, construction or effect of an Act of Congress.

CONCLUSION

It is our most earnest position that this case was properly dismissed by the District Court for want of Federal jurisdiction, and that the appellant must resort to the proper State court for such relief as it may be entitled to here.

Respectfully submitted,

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